

Washington Law Review

Volume 76 | Number 2

4-1-2001

The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle

Aaron Perrine

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [First Amendment Commons](#)

Recommended Citation

Aaron Perrine, Notes and Comments, *The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 Wash. L. Rev. 635 (2001).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol76/iss2/10>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

THE FIRST AMENDMENT VERSUS THE WORLD TRADE ORGANIZATION: EMERGENCY POWERS AND THE BATTLE IN SEATTLE

Aaron Perrine

Abstract: The 1999 World Trade Organization (WTO) ministerial meeting in Seattle was the target of highly organized, widely supported protest demonstrations. In response to the protests, city officials declared a state of emergency, ordering nighttime curfews and a daytime "no-protest zone" in downtown Seattle. They reasoned that the zone was necessary to protect the rights of WTO delegates and to restore public order. This Comment argues that mass nonviolent protests deserve more First Amendment protection than was afforded to demonstrators in Seattle. Even when violence occurs and public order is threatened, governments must narrowly tailor emergency orders to avoid trampling on peaceful protesters' First Amendment rights. An analysis of U.S. Supreme Court and Ninth Circuit case law demonstrates that Seattle's "no-protest zone" was unconstitutional and that courts should strike down similar restrictions on mass protests.

On November 30, 1999, nearly 40,000¹ people gathered in downtown Seattle in a "mass demonstration"² to protest the annual ministerial meeting of the World Trade Organization (WTO).³ Protesters representing labor, environmental, and human and animal rights groups considered the WTO ministerial meeting a unique opportunity to express their views on the effects of globalization and on the global influence of transnational corporations.⁴ Demonstrations forced the delay of the ministerial meeting's opening ceremony because many delegates could not reach the Washington State Convention and Trade Center from their

1. The exact number of protesters within the downtown core on November 30 is difficult to establish. The size of the labor march that arrived downtown in the afternoon was estimated by police to be 40,000 people. Seattle Police Department After Action Report Nov. 29–Dec. 3 1999, at http://www.ci.seattle.wa.us/spd/SPDMainsite/wto/summary_of_events.htm (last visited May 1, 2001) [hereinafter Police Summary of Events]. Others have estimated the total number of protesters present throughout the day at 50,000. Heath Foster & Kery Mirakami, *Schell and Stamper Can Expect To Be Severely Criticized*, SEATTLE POST-INTELLIGENCER, Dec. 4, 1999, at A6. It seems clear that thousands of protesters were downtown before the marchers arrived. See generally *id.*

2. For purposes of this Comment, "mass demonstration" or "mass protest" means an event that (1) involves thousands of protesters in the public fora of city streets who (2) may advocate or participate in civil disobedience but (3) are, with few (though notable) exceptions, nonviolent.

3. Police Summary of Events, *supra* note 1.

4. See David Postman & Lynda V. Mapes, *Why WTO United So Many Foes*, SEATTLE TIMES, Dec. 6, 1999, at A22.

hotels.⁵ The vast majority of protesters were peaceful, obeyed the police, and were not civilly disobedient; however, property damage, violence, and police provocation occurred.⁶ By mid-afternoon, Seattle Mayor Paul Schell had declared a state of emergency.⁷ Between 3:30 p.m. on November 30 and 6:00 a.m. on December 1, Mayor Schell issued three emergency orders.⁸ One of these orders, Emergency Order Number 3 (Order 3) established a limited daytime curfew zone in downtown Seattle.⁹ Order 3 did not, on its face, restrict the type of activity allowed within the zone; however, many have concluded that the zone was enforced as a “no-protest zone,” keeping demonstrators, but not shoppers, out of downtown for the rest of the conference.¹⁰ Although public order was restored by December 1,¹¹ city officials did not lift the “no-protest zone” until after the conference ended on December 3.¹²

A discussion of the constitutional implications of mass demonstrations is relevant and timely. Protesters continue to litigate whether their First

5. Stephen H. Dunphy, *Numbers Low for Besieged WTO Opening: 3,000 Expected; 200 Seats Filled*, SEATTLE TIMES, Nov. 30, 1999, at A12.

6. See David Postman, *Group Rejects Others' Pleas of 'No Violence': Black-Clad Anarchists Target Cars, Windows*, SEATTLE TIMES, Dec. 1, 1999, at A12; see also David Postman & Mike Carter, *Police Switch to New Strategy: They Say Rough Protest Caught Them Off Guard*, SEATTLE TIMES, Dec. 1, 1999, at A1.

7. Jack Broom et al., *Protesters Banned, Arrested: Hundreds Hauled Off as Downtown Becomes a Restricted Zone*, SEATTLE TIMES, Dec. 1, 1999, at A12.

8. The precise moment when each order was promulgated is unknown and has been the subject of much debate; however, all three were in effect by the early morning of December 1. *Id.* Emergency Order Number 1 established a nighttime curfew in downtown Seattle. Local Proclamation of Civil Emergency Order Number 1, at <http://www.ci.seattle.wa.us/wto/procs1a.htm> (last visited May 1, 2001) [hereinafter Order 1]. Emergency Order Number 2 prohibited the use, possession, and sale of gas masks to anyone other than the police or the military (one version also allowed sales to members of the press with proper credentials). Local Proclamation of Civil Emergency Order Number 2, at <http://www.ci.seattle.wa.us/wto/procs2.htm>. (last visited May 1, 2001). This Comment does not address the constitutionality of these other orders.

9. Local Proclamation of Civil Emergency Order Number 3 (revised), at <http://www.ci.seattle.wa.us/wto/procs3.htm> (last visited May 1, 2001) [hereinafter Order 3]. For an excellent map of the restricted area and protest events, see http://www.cityofseattle.net/wtocommittee/maps/map_intro.htm. Between the time of its initial promulgation and its expiration on December 4, Order 3 was revised such that the original “panhandle” encompassing the Westin Hotel was no longer part of the restricted zone.

10. Timothy Burgess et al., Report to the Seattle City Council WTO Accountability Committee by the Citizen's Panel on WTO Operations (Sept. 7, 2000) at 31, at http://www.cityofseattle.net/wtocommittee/panel3_report.pdf (last visited May 1, 2001) [hereinafter Operations Panel Report].

11. See *infra* notes 35–40 and accompanying text.

12. Robert T. Nelson & Brier Dudley, *Downtown Reopens Today for Business*, SEATTLE TIMES, Dec. 4, 1999, at A1.

Amendment rights were denied by the City of Seattle and the Seattle Police Department.¹³ In addition, legal analysis of the Seattle WTO demonstrations should apply with equal force to similar demonstrations, such as the International Monetary Fund/World Bank protests in Washington, D.C., on April 16–17, 2000, the Republican National Convention protests on August 1–4, 2000, the Democratic National Convention protests on August 14–17, 2000, and the presidential inauguration protests on January 20, 2001.¹⁴ Courts need a consistent analytical framework for assessing government responses to mass demonstrations.

This Comment argues that Order 3 was used to regulate and restrict activities protected by the First Amendment. In the context of mass demonstrations, the First Amendment should protect peaceful protesters when their message is unpopular and their audience hostile—even when other protesters are violent or commit illegal acts. Part I details a chronology of the WTO meetings to facilitate a discussion of Order 3’s constitutionality. Part II demonstrates how the First Amendment protects protesters’ rights to express their views in public fora. Part III discusses the evolution of emergency power in the United States and the extent to which this power legitimately restricts First Amendment rights. Finally, Part IV argues that measures such as Order 3 violate the First Amendment and may not be used by local governments to restrict mass protests.

I. THE SEATTLE WTO MINISTERIAL MEETING AND THE NONVIOLENT PUBLIC PROTESTS

In spite of adequate notice, the City of Seattle and its police force were unprepared for the mass demonstrations that took place on November 30, 1999.¹⁵ In the months leading up to the WTO conference, Seattle Mayor Paul Schell and other city officials focused their attention

13. *Menotti v. City of Seattle*, No. C00-372R (W.D. Wash. Mar. 7, 2000) (complaint), available at <http://www.aclu-wa.org/issues/police/wto-second.complaint.3.7.00.html> (last visited May 1, 2001); *Moore v. City of Seattle*, No. C00-1156R (W.D. Wash. July 11, 2000) (complaint).

14. Activists who cut their teeth in Seattle have also gone on to stage highly organized, very large, peaceful protests around the world. See, e.g., Anthony DePalma, *In Quebec’s Streets, Fervor, Fears and a Gamut of Issues*, THE NEW YORK TIMES, Apr. 22, 2001 at A1 (describing mass demonstrations at the third Summit of the Americas in Quebec, Canada).

15. Seattle Police Department After Action Report Nov. 29–Dec. 3 1999, at http://www.ci.seattle.wa.us/spd/SPDMainsite/wto/lessons_learned.htm (last visited May 1, 2001).

on promoting the potential benefits of the conference to the Puget Sound region.¹⁶ As November approached, city officials optimistically presumed that the city was prepared to handle the protests and the conference without additional law enforcement assistance.¹⁷ The Direct Action Network and other protest groups, however, were unambiguous in their intent to use nonviolent protest to shut down the WTO meeting by filling the streets and blocking access to the convention center.¹⁸ By 6:00 a.m. on November 30, few Seattle police officers had been deployed, even as protesters fanned out into preplanned groups to block key intersections.¹⁹ By 8:30 a.m., Seattle was witnessing its largest ever mass nonviolent protest.

The vast majority the protestors who filled city streets on November 30 were nonviolent; in fact, many took affirmative steps to prevent violence and to stop violence where it occurred.²⁰ Media reports, however, focused attention on the so-called "Black Block" anarchists, who wore distinctive black clothing and were photographed committing vandalism on November 30.²¹ While these violent individuals represented only a small fraction of the protestors downtown, few if any were arrested on the 30th.²²

As the day progressed, the Seattle Police Department incrementally lost control of downtown Seattle.²³ While the City had issued myriad

16. Dr. Carl Livingston et al., Report to the Seattle City Council WTO Accountability Review Committee at 14, at <http://www.cityofseattle.net/wtocommittee/p2finalreport.doc> (last visited May 1, 2001) [hereinafter Planning Panel Report].

17. Mike Barber, *City Rejected Offers of Help Even as Tear Gas Filled Streets*, SEATTLE POST-INTELLIGENCER, Dec. 4, 1999, at A1.

18. Operations Panel Report, *supra* note 10, at 13–14; see also Scott Sunde, *It's Protest City—and Get Ready for the Big One Today*, SEATTLE POST-INTELLIGENCER, Nov. 30, 1999, at A1.

19. Police Summary of Events, *supra* note 1.

20. The Seattle City Council and the Seattle Police Department agree that only a small minority of WTO protestors were violent. Operations Panel Report, *supra* note 10, at 7; Police Summary of Events, *supra* note 1. A larger, but still relatively small, number committed nonviolent civil disobedience. Operations Panel Report, *supra* note 10, at 4. The majority of protestors were engaged in nonviolent, legal behavior on November 30. *Id.*

21. See Nicole Brodeur, *Vandals Destroy Message of March*, SEATTLE TIMES, Dec. 1, 1999, at A14.

22. Operations Panel Report, *supra* note 10, at 19–20.

23. See *id.* By mid-morning, the police department nearly ran out of tear gas and pepper spray, and had more flown in from Wyoming. Plainclothes officers were forced to "smuggle" additional canisters of the chemical weapons through crowds of protestors. J. Martin McOmber et al., *Police Caught Short at WTO: Officers Went to Wyoming for Tear Gas*, SEATTLE TIMES, Mar. 8, 2000, at A1, B1.

demonstration and parade permits,²⁴ the police blamed “unscheduled” events for disrupting the WTO conference.²⁵ Many WTO delegates were stranded at their hotels because the City had not provided secure routes to and from the convention center.²⁶ The City was similarly unprepared to arrest the tiny minority of violent protestors, whose activities intensified throughout the day.²⁷ By 3:00 p.m., with more than 20,000²⁸ protesters in the streets and a labor-union march about to converge on downtown, Mayor Schell declared a state of emergency.²⁹ At Mayor Schell’s request, Governor Gary Locke mobilized the Washington National Guard.³⁰ By the early morning³¹ of December 1, Mayor Schell had signed Emergency Order 3, which established an “exclusionary zone,” a daytime curfew restricting access to a fifty-block area of the downtown core.³² Within the zone, Order 3 declared that “no person shall enter or remain in a public place.”³³ The Order contained exceptions for WTO delegates and personnel, employees and owners of businesses within the zone, persons who resided within the zone, properly credentialed press, city officials, and emergency and public-safety personnel.³⁴

Smaller protests continued throughout the week. On December 1, some additional violence and vandalism occurred, and hundreds of nonviolent protesters were arrested.³⁵ December 2 “saw a significant de-escalation in demonstration activities” and police reported only one, peaceful demonstration of approximately 1,000 protestors.³⁶ On December 3, police reported no significant threats to public order.³⁷

24. Declaration of Assistant Police Chief Kimerer, *ACLU v. City of Seattle*, No. C99-1938 (W.D. Wash. Nov. 30 1999) (including parade permits) [hereinafter Kimerer Declaration].

25. *Id.*

26. See Postman & Carter, *supra* note 6.

27. See Police Summary of Events, *supra* note 1.

28. See *supra* note 1.

29. See Order 1, *supra* note 8.

30. Broom et al., *supra* note 7.

31. See *supra* note 8; cf. Kimerer Declaration, *supra* note 24, at 3–4.

32. See Postman & Carter, *supra* note 6.

33. Order 3, *supra* note 9.

34. *Id.*

35. Police Summary of Events, *supra* note 1.

36. *Id.*

37. *Id.*

Police officers from around the state and National Guard troops remained deployed downtown throughout the week.³⁸ After the chaotic events of November 30, police never again lost control of downtown, and at all times subsequent to the afternoon of December 1 WTO delegates were able to travel safely to and from their hotels.³⁹ Although public order had been restored, Order 3 remained in effect, keeping protesters far away from WTO delegates for the remainder of the conference. Order 3 expired at 7:00 a.m. on Saturday, December 4.⁴⁰

Protestors stated that the opportunity to interact with WTO delegates was unique, and that the City's actions caused irreparable harm to their right of free expression.⁴¹ On Wednesday, December 1, the American Civil Liberties Union (ACLU) sought an injunction against Order 3 in federal court.⁴² The ACLU cited *Collins v. Jordan*⁴³ for the proposition that daytime exclusionary zones violate the First Amendment.⁴⁴ Citing *Madsen v. Women's Health Center*,⁴⁵ the City argued that establishing a buffer zone to protect private property and ensure the free flow of traffic was constitutional.⁴⁶ District Judge Robert Bryan noted that each case involved distinguishable factual situations, but declined to grant the injunction.⁴⁷ While litigation is ongoing regarding whether the City infringed on the First Amendment rights of protesters during the WTO ministerial meeting, no court has subsequently reviewed the constitutionality of Order 3.

38. *Id.*

39. *See generally id.*

40. *Id.*

41. Daniel Jack Chasan et al., *Out of Control, Seattle's Flawed Response to the WTO Protest*, at <http://www.aclu-wa.org/ISSUES/police/WTO-Report.html> (last visited May 1, 2001). The ministerial meeting was the first WTO conference to occur in the United States. *See* http://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited May 1, 2001); *see also* Operations Panel Report, *supra* note 10, at 4 (finding ability of anti-WTO groups to protest in visible and effective manner was "seriously impaired" by limited curfew zone).

42. *ACLU v. City of Seattle*, No. C99-1938 (W.D. Wash. Dec. 1, 1999); *see* Duff Wilson, *Free-Speech Rights vs. Protest Ban*, SEATTLE TIMES, Dec. 1, 1999, at A15.

43. 110 F.3d 1363 (9th Cir. 1996); *see infra* Part III.B.

44. Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order, *ACLU v. City of Seattle* (W.D. Wash. Dec. 1, 1999) (No. C99-1938), *available at* www.aclu-wa.org/issues/police/WTO-Memo.in.Support.of.Motion.html (last visited Apr. 17, 2001).

45. 512 U.S. 753 (1994); *see infra* notes 90-95 and accompanying text.

46. Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order, *ACLU v. City of Seattle* (W.D. Wash. Dec. 1, 1999) (No. C99-1938).

47. *ACLU v. City of Seattle*, No. C99-1938 (W.D. Wash. Dec. 1, 1999) (order denying motion for injunctive relief).

II. MASS DEMONSTRATIONS AND THE FIRST AMENDMENT

The First Amendment to the U.S. Constitution provides that “Congress shall make no law . . . abridging the freedom of speech”⁴⁸ It is axiomatic, however, that States are not “powerless to regulate the conduct of demonstrators and picketers.”⁴⁹ The U.S. Supreme Court has articulated rules for the restriction or regulation of First Amendment activities. First, violent or threatening acts by separate groups cannot be a basis for arresting peaceful protesters. Second, even if protests are violent or some protesters break the law, the protest movement itself cannot be characterized as “violent” for First Amendment purposes unless violence is “pervasive.” Third, the Court closely scrutinizes restrictions that act as “prior restraints” on speech. Finally, content-neutral regulations are subject to reduced scrutiny, but must still meet the constitutional guidelines set forth by the Court. This part will consider each rule in turn.

A. *Peaceful Demonstrators Retain Their First Amendment Rights Even when Violent Counterdemonstrations Occur*

A speaker conveying an unpopular message can engender a hostile audience response that threatens public order. Conflicting U.S. Supreme Court precedent exists as to whether police can infringe on peaceful speakers’ First Amendment rights to avoid violence by the speakers’ audience. While an early case allowed this “heckler’s veto”⁵⁰ to override a speaker’s First Amendment rights, the right to deliver an unpopular message has been supported in later decisions.

In an early case, the Court held that First Amendment rights gave way when unpopular speech threatened public order. In *Feiner v. New York*,⁵¹ Irving Feiner, a black man, used a bullhorn to address a small crowd in Syracuse, New York.⁵² His comments included racially charged, derogatory remarks toward government officials.⁵³ Feiner’s speech excited white members of the crowd, and at least one crowd member

48. U.S. CONST. amend. I.

49. *Gregory v. City of Chicago*, 394 U.S. 111, 124 (1969).

50. Eve H. Lewin Wagner, Note, *Heckling: A Protected Right or Disorderly Conduct?*, 60 S. CAL. L. REV. 215, 219 (1986).

51. 340 U.S. 315 (1951).

52. *Id.* at 316–17.

53. *Id.* at 317.

threatened violence if the police did not order Feiner to stop.⁵⁴ Fearing a fight would break out, a police officer asked Feiner to step down from his podium, and later arrested him for disobeying that order.⁵⁵ The Court found that the order to stop speaking was reasonable and that the policeman had acted out of a desire to protect public safety, not because he disagreed with Feiner or wanted to stifle his political message.⁵⁶

The *Feiner* decision has been eclipsed by later case law. For example, in *Gregory v. City of Chicago*,⁵⁷ protesters marched to Chicago Mayor Richard Daley's home to protest the delay in desegregating the city's public schools.⁵⁸ While the march itself was peaceful and orderly, hecklers from the neighborhood were insulting and violent, hurling eggs and rocks and threatening the protesters.⁵⁹ Although nearly 100 police officers accompanied the eighty-five protesters, the hostile crowd grew to more than 1200.⁶⁰ The Chicago police, fearing they could not control the crowd, ordered Gregory and other marchers to disperse and arrested them when they refused to do so.⁶¹ Gregory was convicted under a Chicago disorderly conduct statute.⁶²

The *Gregory* Court held that the marchers were protected by the First Amendment.⁶³ The Court noted that "peaceful and orderly" marching fell within the sphere of protected First Amendment activities and that the state's charge of disorderly conduct against the protesters was without evidentiary support.⁶⁴ Finding the conviction lacked evidentiary support implied that the threatening and violent behavior of counter-demonstrators did not make the march itself "disorderly" for First Amendment purposes.⁶⁵ While *Gregory* did not explicitly overrule

54. *See id.*

55. *Id.* at 317-18.

56. *Id.* at 320-21.

57. 394 U.S. 111 (1969).

58. *Id.* at 115 (Black, J., concurring).

59. *Id.* at 126-30 (Black, J., concurring).

60. *Id.* at 128-30 (Black, J., concurring).

61. *Id.* at 116-17 (Black, J., concurring).

62. *Id.* at 112.

63. *Id.* at 112-13.

64. *Id.* at 112.

65. *See, e.g.,* *Sabel v. Stynchcombe*, 746 F.2d 728, 730-31 (11th Cir. 1984) (holding that arrest for failure to obey police was order unconstitutional because hostile audience, rather than demonstrators, was source of public disorder).

Feiner,⁶⁶ the rule in *Gregory* is that the acts of groups separate from peaceful protesters do not diminish the latter's First Amendment rights.⁶⁷

B. Peaceful Demonstrators Retain Their First Amendment Rights Even when Isolated Incidences of Protester Violence Occur

Although violent protest is not protected by the First Amendment, nonviolent protesters retain their First Amendment rights even if violent acts occur simultaneously with peaceful protests. In *NAACP v. Claiborne Hardware Co.*,⁶⁸ the U.S. Supreme Court held that a seven-year NAACP boycott against businesses in Claiborne County, Mississippi, was protected by the First Amendment even though acts of violence were carried out by boycott participants. In *Claiborne*, merchants brought suit against the NAACP, the chief organizer of the boycott.⁶⁹ The Mississippi Supreme Court held the NAACP liable under Mississippi tort law, and awarded damages based on the economic loss merchants suffered during the boycott.⁷⁰ The U.S. Supreme Court reversed.⁷¹

The boycott at issue in *Claiborne* was not entirely peaceful. Some activists threatened black citizens of Claiborne County with violence if they patronized white-owned businesses.⁷² In two cases, shots were fired at homes of blacks who disregarded the boycott.⁷³ In at least one case property damage occurred.⁷⁴ Additionally, a group of protesters known as "Black Hats" stood outside boycotted businesses, recording names of those who entered and generally intimidating Claiborne citizens.⁷⁵ At one point during the boycott, tension was so high that local police requested reinforcements from the Mississippi Highway Patrol⁷⁶ and the mayor established a nighttime curfew.⁷⁷ Still, the Court noted that the "practices

66. The *Gregory* Court distinguished *Feiner* by noting that the Chicago ordinance did not define "disorderly conduct" as the failure to obey a police order. *Gregory*, 394 U.S. at 112 n*.

67. See generally *Wagner*, *supra* note 50, at 219–22 (comparing *Gregory* with *Feiner*).

68. 458 U.S. 886 (1982).

69. *Id.* at 889.

70. *Id.* at 894–95.

71. *Id.* at 934.

72. *Id.* at 903–04.

73. *Id.* at 904.

74. *Id.*

75. *Id.* at 903.

76. *Id.* at 902.

77. *Id.*

generally used [by the protesters] to encourage support for the boycott were uniformly peaceful and orderly,” and refused to hold the organizers liable for economic damages.⁷⁸ The Court found no justification for abridging the First Amendment rights of boycotters where the majority of the conduct stemming from the boycott was peaceful:

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts.⁷⁹

Claiborne elucidates a different facet of First Amendment law than *Gregory*. In *Gregory*, the Court held that violence by outside hecklers—counterprotesters not sharing the same purpose as those arrested—did not excuse the government’s transgression of First Amendment rights.⁸⁰ In *Claiborne*, the Court carved out a larger space of First Amendment protection, suggesting that unless violence is “pervasive,”⁸¹ the rights of nonviolent protesters must be protected.

C. Courts Strictly Scrutinize Prior Restraints on First Amendment Rights

Courts strictly scrutinize prior restraints⁸² on expression. The U.S. Supreme Court has held that “prior restraints [on] expression [come] to this Court bearing a heavy presumption against . . . constitutional validity.”⁸³ The early cases developing the use of prior restraints generally involved statutes or ordinances creating standardless licensing

78. *Id.* at 903 (emphasis added).

79. *Id.* at 933.

80. See *supra* notes 57–67 and accompanying text.

81. See *Claiborne*, 458 U.S. at 923.

82. Prior restraints are those which “restrain a particular expression prior to its dissemination.” Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984).

83. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (holding that prior restraints on publication are presumed unconstitutional).

schemes.⁸⁴ Modern cases, discussed here, focus on whether speech is being targeted because of its content and whether the expression of a given message is foreclosed entirely by the restriction at bar. These cases focus on injunctions granted by lower courts to prohibit expressive activity.

Injunctions against First Amendment activities may operate as prior restraints when their purpose is to restrict the content of a particular message and when expression of that content is foreclosed ahead of time.⁸⁵ For example, in *New York Times Co. v. United States*,⁸⁶ the federal government attempted to obtain an injunction barring the New York Times newspaper from publishing the "Pentagon Papers," a classified report on government policy during the Vietnam War.⁸⁷ The Court held that the government had not met the "heavy burden" of justifying a prior restraint on speech, and declined to grant an injunction against publication of the report.⁸⁸

Not all restrictions that restrain speech prior to its occurrence constitute prior restraints. In *Madsen v. Women's Health Center*,⁸⁹ for example, a Florida state judge issued an injunction establishing a thirty-six-foot buffer zone around an abortion clinic.⁹⁰ Within the zone, anti-abortion protest was not allowed.⁹¹ The Court refused to analyze the injunction as a prior restraint and instead found it to be a "content-

84. Statutes or ordinances requiring licenses to exercise First Amendment rights, for example, to distribute leaflets or parade on city streets, must provide standards for the issuance of the licenses that are not vague or overbroad. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (addressing ordinances that require permits for parades); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (addressing ordinances that require permits for leafleting).

85. See, e.g., *Vance v. Universal Amusement Co.*, 445 U.S. 308, 308 (1980); *N.Y. Times Co. v. United States*, 403 U.S. 713, 713-14 (1971). Injunctive relief often comes in the form of a Temporary Restraining Order (TRO), immediately forcing one party to take or not take action contrary to the court's ruling. In the Ninth Circuit, a motion for a TRO requires that the moving party show: (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor. FED. R. CIV. P. 65(b); *Jacobsen v. U.S. Postal Serv.*, 812 F.2d 1151, 1152 (9th Cir. 1987).

86. 403 U.S. 713 (1971).

87. *Id.* at 714; see also *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994).

88. 403 U.S. at 714. Under the collateral-bar rule, the underlying unconstitutionality of an injunction is not a defense to its violation, unless it is unconstitutional in all aspects. As a result, injunctions against expressive activity warrant particular judicial scrutiny. See generally Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 551-52 (1977).

89. 512 U.S. 753 (1994).

90. *Id.* at 759.

91. *Id.*

neutral”⁹² order that left open alternative methods of expression.⁹³ Because protesters could still protest from the other side of the street, across from the clinic, the ban was only an “incidental” restriction on free expression and was therefore permissible.⁹⁴

Although the injunction in *Madsen* was held not to be a prior restraint, the Court noted that the First Amendment prohibited restricting any more speech than was necessary to serve the government’s interest.⁹⁵ While the Court held that the thirty-six-foot buffer zone was justified and still left adequate additional avenues for expression, it struck down other portions of the injunction.⁹⁶ The *Madsen* Court held unconstitutional the restricting on the use of “images observable” to patients within the clinic, and restricting protesters from approaching patients for the purpose of providing counseling within 300 feet of the clinic.⁹⁷ This portion of the *Madsen* holding suggests that courts must analyze the specific parameters of restrictions to determine whether they are justified vis-à-vis the government’s interest.

D. *Judicial Review of Content-Neutral Restrictions*

Content-neutral restrictions on expressive activity are those that do not depend on the content or communicative impact of the activity, facially or as applied.⁹⁸ Compared to prior restraints, content-neutral restrictions enjoy a substantially reduced level of judicial scrutiny. Not all content-neutral restrictions, however, survive even this level of scrutiny.

To determine whether a restriction on public expression is content neutral, courts examine whether the government “has adopted a regulation of speech because of disagreement with the message it conveys.”⁹⁹ As long as the government articulates a legitimate interest “unrelated to the suppression of free expression,” the actual effect of the restriction is inapposite.¹⁰⁰ Even where a restriction has an “incidental

92. See *supra* Part II.D.

93. See *Madsen*, 512 U.S. at 764 n.2.

94. *Id.* at 763.

95. *Id.* at 765.

96. *Id.* at 772–73.

97. *Id.*

98. See generally LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (1978).

99. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

100. *United States v. O’Brien* 391 U.S. 367, 377 (1968).

effect” on some viewpoints but not others, the restriction is deemed content neutral if it is “justified without reference to the content of the regulated speech.”¹⁰¹

Content-neutral restrictions may regulate expression, but may not ban protected classes of speech entirely.¹⁰² The Court has held that a prohibition on an entire class of speech, even though free of content or viewpoint discrimination, poses too great a danger to First Amendment rights by “eliminating a common means of speaking.”¹⁰³ For example, in *Schneider v. State*,¹⁰⁴ the Court struck down an ordinance prohibiting leafleting on public streets.¹⁰⁵ Even though the ordinance was content neutral, the Court found that the state’s interest in preventing littering was insufficient to justify a ban on leafleting as an entire class of speech.¹⁰⁶

Content-neutral restrictions fall into two general categories. When the government is attempting to regulate the underlying *conduct* associated with expressive activity, and a restriction on First Amendment rights is incidental to the conduct-based regulation, the restriction is subject to the test in *United States v. O’Brien*.¹⁰⁷ Second, when the government applies content-neutral restrictions to expressive activity in the public forum, it may regulate only the time, place, or manner of the activities, under the rule in *Ward v. Rock Against Racism*.¹⁰⁸ The U.S. Supreme Court has applied these time, place, and manner rules to restrictions designed to protect the entry to and exit from specific locations in the context of abortion-clinic cases.

101. *Ward*, 491 U.S. at 791–92 (quoting *Clark*, 468 U.S. at 293); see also *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

102. See *Schneider v. State*, 308 U.S. 147, 162 (1939).

103. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

104. 308 U.S. 147 (1939).

105. *Id.* at 162.

106. *Id.* The First Amendment permits governments to require a permit for expressive activities where the permitting scheme is content neutral and serves a legitimate government interest. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 574–76 (1941) (upholding statute requiring parade permits because it served legitimate government interest in maintaining public safety, traffic flow, and adequate policing during parades). But see *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (overturning city ordinance requiring permit to distribute leaflets on grounds that permitting scheme amounted to censorship).

107. 391 U.S. 367 (1968).

108. 491 U.S. 781 (1989). But see *Clark v. Cmty. for Creative Non-Violence* 468 U.S. 288, 297–98 (1984) (holding that if government interest is unrelated to expression, then time, place, and manner restrictions do not apply).

1. *Content-Neutral Restrictions on Expressive Conduct and the O'Brien Test*

United States v. O'Brien sets forth the test for evaluating content-neutral restrictions on expressive activities. In *O'Brien*, the defendant was arrested for burning his draft card in violation of a federal statute.¹⁰⁹ The defendant argued that burning the card was expressive activity protected by the First Amendment.¹¹⁰ The U.S. Supreme Court disagreed¹¹¹ and articulated a test for determining the constitutionality of content-neutral restrictions on expression:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹¹²

In applying this test, the *O'Brien* Court upheld the statute that banned the burning of draft cards. First, the Court found that the statute was part of a registration system for military conscription, valid pursuant to Congress's power to raise and support armies.¹¹³ Second, the Court found that the statute furthered the "substantial" government interest in efficient operation of the draft.¹¹⁴ Third, the Court found that only the noncommunicative impact of the defendant's conduct was prohibited by the statute, and that the statute did not discriminate based on the content of speech that accompanied the illegal conduct of burning a draft card.¹¹⁵ Fourth, the Court found that the statute was narrowly tailored because it prohibited only conduct that clearly frustrated the government's interest in a smooth-running conscription system.¹¹⁶

109. 391 U.S. at 370-71.

110. *Id.*

111. *Id.* at 371-72.

112. *Id.* at 377.

113. *Id.* at 377-78.

114. *Id.* at 381-82; see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984). For a discussion of what constitutes a substantial government interest, see Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 438 (1999).

115. *O'Brien*, 391 U.S. at 379-80.

116. *Id.* at 381-82.

2. *Content-Neutral Restrictions in Public Fora and the Ward Test*

When restricting expressive activity in public fora, the government may regulate only the time, place, or manner of the activity. The test for time, place, or manner restrictions is very similar to the *O'Brien* test for expressive conduct. In *Ward v. Rock Against Racism*,¹¹⁷ the Court found constitutional an ordinance requiring concert organizers in Central Park to use sound equipment provided by the city rather than private equipment.¹¹⁸ The government's stated purpose was to shield the public from excessive noise by controlling the volume of concerts in the park.¹¹⁹ Because the government's interest was unrelated to the content of the music played, the Court held that the ordinance was content neutral.¹²⁰

The *Ward* Court also noted that time, place, and manner restrictions must be narrowly tailored and leave open alternative channels for communication.¹²¹ However, the Court stressed that the government's need not employ the least restrictive method of serving the government's interest. Instead, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"¹²² The Court held that the ordinance met the "alternative channels" test because users of the Central Park band shell could still adequately express their message with reduced volume.¹²³

In the Ninth Circuit, the government bears the burden of showing that time, place, and manner restrictions are narrowly tailored and provide adequate alternative methods for communication.¹²⁴ In *Bay Area Peace Navy v. United States*,¹²⁵ a seventy-five-yard "safety exclusion zone" in front of the VIP pier during a Fleet Week boat parade was held unconstitutional.¹²⁶ The Bay Area Peace Navy, a local activist group,

117. 491 U.S. 781 (1989).

118. *Id.* at 802.

119. *Id.*

120. *Id.* at 792.

121. *Id.* at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

122. *Id.* at 798–99 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

123. *Id.* at 802.

124. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (holding that government bears the burden of proving that restriction is narrowly tailored and leaves open alternative methods for communication).

125. 914 F.2d 1224 (9th Cir. 1990).

126. *Id.* at 1231.

wished to demonstrate against the celebration of U.S. naval power by conducting its own boat parade in front of the pier.¹²⁷ Because the group's expressive activity included singing and other oral communication, its parade would have been ineffective from seventy-five yards away.¹²⁸ The Ninth Circuit noted that the government "is not free to foreclose expressive activity in public areas on mere speculation about danger,"¹²⁹ and held that the government had failed to show that a seventy-five-yard exclusion zone was not "substantially broader than necessary."¹³⁰

While within the scope of *Ward* and *O'Brien*, the Ninth Circuit's holding in *Bay Area Peace Navy* explicitly places the burden of proof on the government to justify restraints on expression.¹³¹ The government must prove *both* that the restriction at bar is not "substantially broader than necessary" *and* that ample alternatives are available for the expression being restricted.¹³²

3. *Time, Place, or Manner Restrictions Protecting Entry and Exit at Specific Locations*

The U.S. Supreme Court has addressed restrictions designed to protect entry and exit at particular locations in cases involving abortion clinics. Following *Madsen*,¹³³ the Court in *Schenck v. Pro-Choice Network of Western New York*¹³⁴ held that a "floating buffer zone" of fifteen feet

127. *Id.* at 1225.

128. *Id.* at 1226, 1229.

129. *Id.* at 1228. Subsequent to the bombing of the USS *Cole* in Yemen, it seems reasonable to question whether courts would still reject a security provision of this type. See Jan M. Olsen, 39 *U.S. Sailors in German Hospital*, The Associated Press, Oct. 14, 2000, available at 2000 WL 27906507. Order 3's promulgation, however, was unrelated to terrorism in the sense of the USS *Cole* bombing; although many other security precautions surrounding the WTO conference did address terrorism, they are not the subject of this Comment.

130. *Id.* at 1227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

131. *Id.* ("The government bears the burden of proving that the narrowly tailored and alternative communication prongs are satisfied.") (internal quotation marks omitted) (citing *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1551 (7th Cir. 1986), *aff'd without opinion*, 479 U.S. 1048 (1987)); cf. *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984) ("[I]t is common to place the burden upon the Government to justify impingements on First Amendment interests.").

132. *Id.* at 1228, 1230.

133. See *supra* notes 90–97 and accompanying text.

134. 519 U.S. 357 (1997).

violated the First Amendment.¹³⁵ The injunction in *Schenck* required that protesters move out of the way to stay fifteen feet from individuals entering a clinic.¹³⁶ The Court also reaffirmed the *Madsen* rule, holding that while protecting entry into and exit from a clinic serves a substantial government interest, an injunction restricting First Amendment rights must be narrowly tailored to restrict “no more speech than necessary.”¹³⁷

In *Hill v. Colorado*,¹³⁸ the Court upheld a Colorado statute making it a misdemeanor to “knowingly approach” within eight feet of a person entering or leaving a health care facility “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”¹³⁹ The Colorado Legislature found a significant state interest in “preventing the willful obstruction of a person’s access to medical counseling and treatment at a health care facility.”¹⁴⁰ The Court noted that this interest was unrelated to the suppression of speech.¹⁴¹ In addition, the Court found that the restriction was narrowly tailored, because it provided only an eight-foot buffer zone and did not require a stationary protester to move out of the way if a clinic patron approached within eight feet.¹⁴² Finally, the statute left open adequate alternative methods for expression by allowing any protest, education, or counseling that did not entail moving within eight feet of a clinic patron.¹⁴³

The U.S. Supreme Court has constructed a solid foundation of constitutional rules underlying the First Amendment. First, restrictions on expressive activity cannot be justified through reference to the violence of counter-demonstrators. Second, even when certain protesters are violent, the government bears the burden of showing that the violence colored the entire protest movement before restrictions may be imposed. Third, prior restraints on speech are presumed unconstitutional, and must survive strict scrutiny by the courts. Fourth, restrictions that are facially content neutral are subject to less scrutiny, and are analyzed under the

135. *Id.* at 367.

136. *Id.* at 364.

137. *Id.* at 371 (citing *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 765 (1994)).

138. 120 S. Ct. 2480 (2000).

139. *Id.* at 2484 (quoting COLO. REV. STAT. § 18-9-122 (1999)).

140. *Id.*

141. *Id.* at 2491.

142. *Id.* at 2494.

143. *Id.*

tests formulated in *O'Brien* and *Ward* and explicated in the Ninth Circuit by *Bay Area Peace Navy*. The Court has specifically addressed restrictions designed to protect entry and exit at specific locations, and requires that they affect no more speech than necessary.

III. EMERGENCY POWERS AND THE FIRST AMENDMENT

Emergency powers allow the government to suspend constitutional rights temporarily.¹⁴⁴ In the American constitutional system, “[a] fundamental tension exists . . . between the basic premise of government constrained by law and the perceived need for unfettered, discretionary power to confront dire emergencies.”¹⁴⁵ In the context of the executive orders promulgated during the WTO protest, two features of modern emergency power¹⁴⁶ are of interest. First, the dichotomy between “normal” and “emergency” situations blurred during the twentieth century. The blurring has occurred at the federal level, but has also been exploited by state and local governments. Second, economic issues have risen to the level of an “emergency.” In reviewing modern emergency orders, many courts have applied a low level of judicial scrutiny. The Ninth Circuit, however, splits from other circuits and closely scrutinizes emergency orders promulgated in the context of mass demonstrations.

A. *The Expansion of Emergency Powers*

Changes in the world’s political and military structure beginning in the 20th century have fostered the gradual erosion of any meaningful dichotomy between “normal” and “emergency” power.¹⁴⁷ Increasing globalization and advancing military technology have greatly expanded the number and kinds of threats to which emergency response is necessary and perhaps reasonable.¹⁴⁸ As the pace of global politics has

144. See, e.g., *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971).

145. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1386 (1989).

146. For an explanation of the origins and early development of emergency powers, see *id.*, at 1386–97, and Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825, 1826–27 (2000).

147. See Lobel, *supra* note 145, at 1398; cf. Gross, *supra* note 146, at 1847–48.

148. See Lobel, *supra* note 145, at 1399–412.

increased, the political expediency of emergency powers has become more attractive to national executives.¹⁴⁹

As America rose to become a world military and economic leader, the President was granted increasingly broad authority by emergency legislation in Congress.¹⁵⁰ With a few notable exceptions, the U.S. Supreme Court has acquiesced to the President's exercise of emergency powers.¹⁵¹ After Japan attacked Pearl Harbor on December 7, 1941, the Court upheld the constitutionality of military orders relocating and detaining U.S. citizens of Japanese ancestry.¹⁵² Following World War Two, the "emergency" of the Korean War became the constant emergency of the Cold War.¹⁵³ "Emergencies" in the last three decades of the 20th century included such national crises as the introduction of armed forces in Indo-China, Iran, Lebanon, Central America, Grenada, Libya, and the Persian Gulf.¹⁵⁴ Congressional attempts to reform the emergency powers of the executive branch have been ineffective.¹⁵⁵

This blurring of the normal-emergency dichotomy at the federal level has made expanded emergency powers at the state and local levels more constitutionally palatable. State and local emergency statutes are generally written to allow the governor or mayor to respond to natural disasters or severe public disturbances.¹⁵⁶ When the designated government official declares a state of emergency, these statutes allow, for example, the imposition of a curfew, the ban on sales of alcohol and weapons, and forced relocations to emergency shelters.¹⁵⁷ Emergency statutes usually require that the state of emergency expire either within a certain time period absent further proclamation or as soon as the

149. *Id.*; see also Gross, *supra* note 146, at 1858.

150. See Lobel, *supra* note 145, at 1400.

151. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981) (upholding executive emergency power). But see *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

152. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 95 (1943).

153. See generally Lobel, *supra* note 145, at 1399–412.

154. See *id.* at 1414.

155. See *id.* at 1413–15 (describing National Emergencies Act).

156. See, e.g., WASH. REV. CODE § 38.52.020 (2000); SEATTLE, WASH., MUNICIPAL CODE § 10.02.010 (1999); see also CAL. GOV'T CODE § 8625 (West 2001); KANSAS CITY, MO., MUNICIPAL CODE § 50-155 (1998); NEW YORK CITY, N.Y., CODE § 3-104 (2000).

157. See *supra* note 156.

emergency ceases to exist.¹⁵⁸ As discussed below, courts differ as to the stringency with which they review state and local emergency powers.¹⁵⁹

Emergency power in the United States has also evolved along with capitalist liberal democracy.¹⁶⁰ As developed economies have grown more and more dependent on trade and capital flows, economic threats to the state have become more serious, rising even to the level of a military attack.¹⁶¹ By the 1930s, "the notion of the emergency situation was increasingly separated from any evidence of military conflict or armed rebellion whatsoever."¹⁶² The powers granted to President Roosevelt during the Great Depression stand as "the largest single instance of delegated power in American history."¹⁶³

The U.S. Supreme Court addressed economic emergency in an early case in *Home Building & Loan Ass'n v. Blaisdell*.¹⁶⁴ The *Blaisdell* Court upheld Minnesota's mortgage moratorium law.¹⁶⁵ Enacted in response to the Great Depression, the law froze mortgage foreclosures in an alleged violation of the Contract Clause of the U.S. Constitution.¹⁶⁶ While finding that "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved,"¹⁶⁷ the Court's five-to-four decision upheld the Minnesota law.¹⁶⁸ In a decision paradigmatic of the changing face of emergency power, Chief Justice Hughes's opinion noted that "[the] principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."¹⁶⁹ *Blaisdell*

158. See *supra* note 156.

159. See *infra* Part III.B.

160. William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869, 1875 (2000). Scheuerman suggests that the development of emergency powers has followed a four step process: (1) to impose martial law to counter labor strikes; (2) to directly manage the underlying economic crisis itself; (3) to prevent occurrence of economic emergency in the first instance; and (4) to provide a permanent measure of economic management. *Id.*

161. See *id.* at 1878-79; see also Gross, *supra* note 146, at 1863 (noting that free trade has become national-security concern).

162. See Scheuerman, *supra* note 160, at 1878.

163. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 260 (Greenwood Press, Inc. 1979) (1948).

164. 290 U.S. 398 (1934).

165. *Id.* at 447.

166. *Id.* at 415.

167. *Id.* at 425-16.

168. *Id.* at 447-48.

169. *Id.* at 435.

underscored the increasing acceptance of the use of executive powers to confront economic problems.

B. Courts Apply Divergent Standards in Reviewing Local Emergency Orders

In reviewing emergency orders, courts have imposed various levels of judicial scrutiny. For example, the Fourth Circuit refrains from second-guessing emergency orders, applying only minimal due process scrutiny.¹⁷⁰ In *United States v. Chalk*¹⁷¹ the Mayor of Asheville, North Carolina, imposed a nighttime curfew following race riots at Asheville High School.¹⁷² The plaintiffs, convicted of possessing a weapon and driving a vehicle in violation of the curfew, argued that the statute was vague and overbroad, and that the supposed threat to public safety was insufficient to justify the restrictions imposed by the mayor.¹⁷³ While rhetorically suggesting that the use of emergency powers to curtail expressive activity is subject to judicial review, the Fourth Circuit refused to scrutinize the mayor's order.¹⁷⁴ Finding that it would be "highly inappropriate for us . . . to substitute our judgment for his," the court limited its scope of review to determining whether the mayor acted in good faith and had some factual basis for his decision.¹⁷⁵ Thus, the Fourth Circuit failed to apply even intermediate scrutiny to the order, opting instead for a kind of minimal due process scrutiny.¹⁷⁶

Other courts have cited *Chalk* in reviewing emergency orders promulgated in the wake of natural disasters and riots.¹⁷⁷ While concluding that emergency orders must not be vague or overbroad, nor encourage arbitrary enforcement, the courts have upheld the laws and orders in question.¹⁷⁸ The rule in Washington is functionally equiv-

170. The U.S. Supreme Court has not addressed this issue.

171. 441 F.2d 1277 (4th Cir. 1971).

172. *Id.* at 1278.

173. *Id.* at 1280.

174. *Id.* at 1280-81.

175. *Id.* at 1281.

176. See generally *TRIBE*, *supra* note 98.

177. See *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996); *In re Juan C.*, 28 Cal. App. 4th 1093, 1101 (1994); see also *Morgan v. Rhodes*, 456 F.2d 608, 611 (6th Cir. 1972); *Moorhead v. Farrelly*, 727 F. Supp. 193, 200-01 (D.V.I. 1989).

178. See, e.g., *Avino*, 91 F.3d at 110; *Juan C.*, 28 Cal. App. 4th at 1103.

alent.¹⁷⁹ When communities are threatened by natural disasters, courts are understandably hesitant to second-guess the good-faith efforts of local officials.¹⁸⁰

In the context of public disturbances, however, the Ninth Circuit does not follow the “minimal due process scrutiny” rule in *Chalk*. In *Collins v. Jordan*,¹⁸¹ the Ninth Circuit refused to grant immunity to San Francisco officials who imposed a city-wide no-protest ban after violent demonstrations following the Rodney King verdict.¹⁸² The *Collins* court distinguished between a nighttime curfew and a daytime ban on expressive activities, finding that they were “entirely different matter[s]” and holding that no reasonable police officer would believe that the daytime restriction was legal.¹⁸³

In addition, *Collins* established that emergency orders must be tailored to address current crises, and cannot be used to preempt the future exercise of First Amendment rights.¹⁸⁴ The *Collins* court held as a matter of law that “the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter).”¹⁸⁵ The *Collins* court also suggested that emergency orders should not be used as prior restraints on First Amendment activities, noting that when unlawful conduct and First Amendment activities are intertwined, the illegal activities should be punished after their occurrence so as to avoid infringing on constitutional rights.¹⁸⁶

Collins puts the Ninth Circuit at odds with the Fourth Circuit in *Chalk*, which examined only whether executive action was taken “in good faith.”¹⁸⁷ *Collins* shows that it is reasonable to apply a different standard of review to emergency orders where the “emergency” is not a hurricane or a volcano, but the mass exercise of First Amendment rights. In other

179. *Cougar Bus. Owners Ass’n v. Washington*, 97 Wash. 2d 466, 478 (1982) (reviewing emergency orders promulgated subsequent to eruption of Mt. St. Helens).

180. See, e.g., *Avino*, 91 F.3d at 108, 110 (declining to hold that Florida curfew was overbroad, even though it was in effect for twelve weeks after Hurricane Andrew made landfall in Florida).

181. 110 F.3d 1363 (9th Cir. 1996).

182. *Id.* at 1366, 1378.

183. *Id.*

184. *Id.* at 1372–73.

185. *Id.* at 1372.

186. *Id.* at 1372–73.

187. *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971).

words, *Collins* directs courts to scrutinize emergency orders that operate like restraints on the exercise of First Amendment rights.

IV. ORDER 3: AN EXAMPLE OF UNCONSTITUTIONAL RESTRICTIONS ON MASS DEMONSTRATIONS

Restrictions on mass protests—even those promulgated during a declared state of emergency—must meet certain criteria to withstand a First Amendment challenge, especially in the Ninth Circuit. When executives point to clogged streets and broken windows to justify closing the public forum to protestors, courts must determine whether First Amendment rights are being unduly trampled. Order 3, promulgated by Mayor Schell in response to the Seattle WTO protests, exemplifies a restriction that should not survive such scrutiny. An analysis of Order 3 provides a template for how courts should address executive emergency powers stemming from mass demonstrations. First, Order 3 contravenes the holding of *Gregory*, where the Court concluded that police may not abdicate their responsibility to ensure a peaceful forum for political expression through reference to potential or actual violence by third parties. Second, Order 3 fails the rule in *Claiborne*, because violence on the part of some protesters does not reduce the First Amendment protection of other, peaceful protesters. Third, Order 3 operated as a prior restraint on expression and fails the strict scrutiny test. Fourth, Order 3 is not a valid content-neutral restriction. Finally, as an emergency power, daytime protest bans fall squarely within the holding of *Collins* and are thus unconstitutional.

A. *By Infringing on the First Amendment Rights of Peaceful Protesters, Order 3 Fails the Gregory Guidelines*

In evaluating emergency orders that restrict First Amendment rights, courts must first consider *Gregory v. City of Chicago*. *Gregory* held that (1) to the extent violent acts are carried about by groups separate from a peaceful protest movement, such acts do not lessen the First Amendment rights of peaceful protesters and (2) the rights of peaceful protesters may not be infringed on when police are unprepared for and unable to cope with violence marginal to the protest itself.¹⁸⁸

188. *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969).

Although the facts of *Gregory* are distinguishable, Order 3 nonetheless fails the *Gregory* guidelines. In *Gregory*, peaceful protesters were ringed by a hostile audience of counter-demonstrators.¹⁸⁹ The WTO protests in Seattle were larger than those in *Gregory*, and it was other anti-WTO protesters, not a hostile audience, that threatened public order.¹⁹⁰ *Gregory*, however, still applies for two reasons. First, violent protesters can reasonably be treated as counterdemonstrators, similar to those in *Gregory*, because the vast majority of demonstrators held nonviolence as a fundamental tenet of their expressive purpose.¹⁹¹ Second, *Gregory* held that the violent action of other groups provided “no evidence” that the peaceful protesters had been disorderly.¹⁹² The notion that peaceful protest does not become disorderly conduct through the actions of others applies with equal force to the Seattle demonstrations.

Even to the extent that public disorder was threatened by counter-demonstrators, *Gregory* maintained that the government cannot respond by closing the public forum to peaceful protesters.¹⁹³ Seattle officials were not prepared for the demonstration that confronted them on November 30.¹⁹⁴ The violence and property destruction that did occur, however, was not completely unexpected—the police were well informed of the activities of the Black Block and other potentially violent groups.¹⁹⁵ Under *Gregory*, the Seattle Police Department had at least some responsibility to direct its attention to the sources of violence and vandalism before closing off the public forum to peaceful protesters. Order 3 allowed the police to “punt”—authorizing the use of force to clear streets and arrest any protesters downtown. Order 3 contravenes *Gregory* and is an unconstitutional infringement of First Amendment rights.

Admittedly, *Feiner v. New York*,¹⁹⁶ which has not been explicitly overruled, is inconsistent with *Gregory*. *Feiner* holds that when an

189. *Id.*

190. *See id.*; Police Summary of Events, *supra* note 1.

191. *See* Postman & Carter, *supra* note 6.

192. *Gregory*, 394 U.S. at 112.

193. *Id.*

194. *See* Postman & Carter, *supra* note 6.

195. *See supra* Part I; *cf.* Operations Panel Report, *supra* note 10, at 23 (noting that police “failed to take adequate measures to prevent and deter . . . criminal activity”).

196. 340 U.S. 315 (1951).

unpopular protest message engenders a hostile response, police may restrict protesters' speech to maintain public order.¹⁹⁷ Applying *Feiner* to modern protests, however, leads to an absurd result by allowing a "heckler's veto"—a situation where police may halt any demonstration when hecklers appear. Under *Feiner*, speakers disobeying police orders to stop speaking may be arrested and convicted, as long as police action is in response to the crowd reaction and not from a desire to suppress the speakers' viewpoint.¹⁹⁸ The U.S. Supreme Court is unlikely to support such an absurd application of its precedent.¹⁹⁹

Gregory provides the correct, modern standard and holds that police may not abdicate their responsibility to protect the peaceful exercise of First Amendment rights through their own unpreparedness.²⁰⁰ Unlike *Feiner*, *Gregory* looks at whether the protest activity itself is protected by the First Amendment.²⁰¹ Under *Gregory*, Order 3 was invalid because it took away the rights of protesters who were peacefully exercising their First Amendment rights.

B. By Infringing on the First Amendment Rights of Substantially Peaceful Protest Groups, Order 3 Fails the Claiborne Test

Next, courts reviewing emergency orders must consider *NAACP v. Claiborne Hardware Co.*²⁰² The *Claiborne* Court stated unambiguously that perpetrators of violent or illegal acts were not shielded by the First Amendment.²⁰³ *Claiborne*, however, also held that even when elements of the *same* protest commit violent acts, those acts do not characterize the entire protest for First Amendment purposes. The *Claiborne* decision set a high standard for deciding when the "entire collective effort" of a protest has been tainted by violence.²⁰⁴ Under *Claiborne*, violent action is treated as distinct from the underlying political cause, unless the violence

197. *Id.* at 320–21; see *supra* notes 51–56 and accompanying text.

198. *Feiner*, 340 U.S. at 320.

199. See *Wagner*, *supra* note 50, at 219–22.

200. See *supra* notes 57–65 and accompanying text.

201. *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969).

202. 458 U.S. 886 (1982).

203. *Id.* at 933.

204. *Id.*

is so pervasive as to characterize the cause itself as a "violent conspiracy."²⁰⁵

Order 3 violated *Claiborne* by banning demonstrations downtown for three days after the mass demonstrations on November 30. Local officials may have been justified in taking action on November 30 in direct response to violent demonstrators.²⁰⁶ The violence of November 30, however, did not legitimize the foreclosure of all First Amendment rights in the downtown core for the remainder of the WTO conference. Just as the owners of businesses targeted by the *Claiborne* boycott could not restrict peaceful activists from standing outside their stores through reference to other, violent activists,²⁰⁷ the district court should not have permitted Mayor Schell to foreclose the right of peaceful protesters to demonstrate for the remainder of the conference.

Although the boycott at issue in *Claiborne* remains factually distinct from the WTO mass protests, the holding should still apply. The thrust of *Claiborne* is to protect protest movements from being characterized as violent through reference to "relatively few violent acts."²⁰⁸ In that sense, the *Claiborne* rule should apply to mass demonstrations like those occurring during the WTO ministerial in Seattle, where violence was sporadic rather than pervasive. Just as the *Claiborne* Court refused to hold peaceful boycotters responsible for the actions of "Black Hat" enforcers,²⁰⁹ the peaceful WTO protesters should not have been forced to sacrifice their rights to the "Black Block" of violent anarchists.²¹⁰ Under *Claiborne*, peaceful protesters may not be held guilty by association of the acts of vandals and vigilantes.²¹¹

C. *Order 3 Operated as a Prior Restraint and Fails the Strict Scrutiny Test*

When an emergency order acts as a prior restraint, a reviewing court must employ the strict scrutiny standard of *New York Times Co. v.*

205. *Id.*

206. *See, e.g.,* Postman & Carter, *supra* note 6.

207. *Claiborne*, 458 U.S. at 933.

208. *Id.*

209. *Id.* at 925-26.

210. *See* Postman, *supra* note 6.

211. *See supra* note 79 and accompanying text.

United States.²¹² Order 3 does not meet the “heavy burden”²¹³ of *New York Times* because it restricted expressive activity on days when the City could not show the existence of a significant threat to public order.²¹⁴ The government’s interest in restoring public order on November 30 was significant, and implicated the First Amendment rights of WTO delegates and others attempting to travel downtown.²¹⁵ The scales tip heavily against Order 3, however, in subsequent days. The rights of delegates to travel and to assemble were not threatened during December 1–3.²¹⁶ Ample evidence suggests that most protesters would not return on subsequent days. For example, the labor march, which brought thousands downtown, was a one-day event.²¹⁷

While the City of Seattle relied on *Madsen v. Women’s Health Center*²¹⁸ in defending Order 3, *Madsen* actually shows that Order 3 operated as a prior restraint.²¹⁹ In *Madsen*, the Court found that an injunction did not operate as a prior restraint because it left open myriad alternative means for communicating the respondent’s anti-abortion message.²²⁰ Order 3, however, was not an “incidental” burden on WTO protesters. The protesters’ anti-WTO message was completely restricted from a fifty-block area of downtown Seattle,²²¹ thereby precluding their presence in any area where they could potentially interact with WTO delegates. Just as *Madsen* struck down a 300-foot “no-approach zone” as restricting too much speech,²²² so the District Court should have forced Mayor Schell to restrict only as much speech as necessary.

Additionally, Order 3’s duration points toward treating it as a prior restraint. Unlike the anti-abortion protests in *Madsen*, the WTO-protests were inevitably transitory in nature, since the ministerial meeting lasted only until December 3.²²³ The restriction of all protest activity in the

212. 403 U.S. 713 (1971).

213. *Id.* at 714 (internal quotation marks omitted).

214. *See* Chasan, *supra* note 41.

215. *Cf. supra* notes 23–26 and accompanying text.

216. *See* Barber, *supra* note 17.

217. *See, e.g.,* Sunde, *supra* note 18.

218. 512 U.S. 753 (1994).

219. *See supra* notes 90–97 and accompanying text.

220. *Madsen*, 512 U.S. at 764.

221. Postman & Carter, *supra* note 6.

222. *Madsen*, 512 U.S. at 766.

223. *See* Police Summary of Events, *supra* note 1.

downtown core for the duration of the conference did not leave open alternative methods for protest, like protests that occurred after violence had subsided. Peaceful protests should have been allowed on December 1–4, because any restriction that foreclosed protest activity for the entire week could not have been narrowly tailored.

D. Order 3 Fails the Test for Content-Neutral Restrictions on First Amendment Activities

Even where emergency orders are not treated as prior restraints, courts must apply the rules for content-neutral restrictions on speech. While courts should consider the facts of each case when evaluating emergency orders, Order 3 provides a useful template for applying the content-neutral rules. Although Order 3 is facially content neutral,²²⁴ it fails the *O'Brien* test for restrictions that are generally applicable to speech and conduct. While Order 3 did not ban protest in the entire City of Seattle, it fails the *Ward* test for time, place, or manner restrictions on expressive activity in the public fora. Finally, Order 3 is unconstitutional under the U.S. Supreme Court cases that focus specifically on protecting entry and exit at specific locations.

1. Order 3 Fails the O'Brien Test

*United States v. O'Brien*²²⁵ sets forth a broad test for evaluating conduct-based restrictions on First Amendment rights.²²⁶ Order 3 passes the first two prongs of the *O'Brien* test—constitutional authority and significant government interest.²²⁷ Order 3 is unconstitutional because it fails the fourth prong, which requires that restrictions be narrowly tailored.²²⁸ In *O'Brien*, the Court found that a prohibition on destroying

224. Order 3, *supra* note 9. See generally *Madsen*, 512 U.S. at 763 (holding that injunction was content neutral even though it tended to affect those with only one viewpoint).

225. 391 U.S. 367 (1968).

226. *Id.* at 377.

227. See *supra* Part II.D.1–2. It is within the power of the Seattle City Mayor to declare a state of emergency. SEATTLE, WASH., MUNICIPAL CODE § 10.02.010 (1999); see also WASH. REV. CODE § 38.52.020 (2000). Order 3 makes reference to the imminent necessity of “extraordinary measures to protect the public peace, safety and welfare” as required by the Seattle Municipal Code and state law of Washington. See Order 3, *supra* note 9.

228. *O'Brien*, 391 U.S. at 377. Whether Order 3 passes the third prong—the requirement that its purpose be unrelated to suppressing free expression—is disputed by several legal organizations. The ACLU, National Lawyers’ Guild, Trial Lawyers for Public Justice, and Direct Action Network assert

draft cards restricted only as much expressive activity as was necessary to further the government's interest in a smooth-running conscription system.²²⁹ Here, however, the government's interest was served when the association and assembly rights of WTO delegates were no longer threatened, and when public order had been restored to downtown Seattle. Those criteria were met on or before Tuesday morning, December 1.²³⁰ By enforcing the no-protest zone for the next three days, Order 3 restricted more speech than necessary and was unconstitutional.

2. *Order 3 Is Not a Valid Time, Place, or Manner Restriction*

In the narrower context of public-fora speech regulations, *Ward v. Rock Against Racism* requires that time, place, or manner restrictions be "narrowly tailored" and leave open "ample alternative channels" for communication.²³¹ Under *Bay Area Peace Navy v. United States*,²³² governments in the Ninth Circuit bear the burden of proof on both issues.

Order 3 also fails the narrow-tailoring test. In *Bay Area Peace Navy*, the Ninth Circuit held a seventy-five-yard safety zone unconstitutional because military officials could not show that the zone was necessary to protect military officials.²³³ With regard to Order 3, the City bears the burden of producing "tangible evidence" to show that its restrictions on expressive activity were not "substantially broader than necessary."²³⁴ The City cannot show that prohibiting all protest activity in the downtown core on December 1, December 2, and December 3 was necessary to preserve the safety of WTO delegates or to prevent further public disorder; therefore, Order 3 is unconstitutional.

Even aside from the narrow-tailoring test, Order 3 is unconstitutional because it fails to provide ample alternative channels for the protestors to

that police enforcement of Order 3 singled out even the most subtle anti-WTO expression. See, e.g., Chasan, *supra* note 41; Paul Richmond, *Waging War on Dissent, a Report by the Seattle National Lawyers Guild WTO Legal Group*, at <http://seattle.indymedia.org/local/images/NLG-REPORT.pdf> (last visited Apr. 17, 2001). The Seattle City Council's Review Panel agreed. Operations Panel Report, *supra* note 10, at 31–32. As applied, Order 3 was viewpoint-specific, and thus violated the First Amendment.

229. *O'Brien*, 391 U.S. at 381–82.

230. See Chasan, *supra* note 41.

231. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

232. 914 F.2d 1224, 1229 (9th Cir. 1990).

233. *Id.* at 1227.

234. *Id.*

communicate their message.²³⁵ In *Bay Area Peace Navy*, a regulation prohibiting the “Peace Navy” flotilla from coming within seventy-five yards of the official viewing area was held unconstitutional because the protesters’ audience would be unable to hear their singing at that distance.²³⁶ The situation in Seattle is analogous. When WTO protesters were banned from downtown, they were unable to effectively deliver their message.²³⁷ The protesters needed access to the downtown core to be effective; indeed, many groups applied for parade and event permits to protect their rights to demonstrate downtown.²³⁸ Because Order 3 leaves no adequate alternative method for protesters to deliver their message, it fails the *Bay Area Peace Navy* test.

Order 3 is unconstitutional notwithstanding the holding in *Ward*. According to *Ward*, regulations need not be the “least restrictive” possible to serve the government’s interest; the government must show only that its stated interest would be served less effectively absent a given regulation.²³⁹ The facts in *Ward*, however, remain distinct, and the ruling of the *Ward* Court is not applicable in the context of mass demonstrations. *Ward* addressed an ordinance requiring concert organizers to use city-owned sound equipment and a city sound technician during outdoor concerts.²⁴⁰ While volume was controlled, the music itself was never restricted or banned.²⁴¹ Order 3, in contrast, totally banned protest activity within the no-protest zone.²⁴²

3. *Order 3 Is Unconstitutional Under the U.S. Supreme Court’s Entry-Exit Cases*

Finally, Order 3 is unconstitutional under the Court’s abortion-clinic cases—directly analogous holdings governing entry into and exit from specific locations. These cases establish that protecting entry and exit can constitute a significant government interest, such that an incidental

235. *Id.* at 1229.

236. *Id.* at 1226, 1229.

237. Operations Panel Report, *supra* note 10, at 4–5.

238. Kimerer Declaration, *supra* note 24 (including parade permits).

239. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

240. *Id.* at 784.

241. *See id.*

242. Order 3, *supra* note 9.

impact on First Amendment rights is acceptable.²⁴³ The Court, however, has consistently scrutinized geographic restrictions to ensure that “no more speech than necessary” is restricted.²⁴⁴ A thirty-six-foot exclusionary zone around a building was held constitutional, as was an eight-foot zone around patients and clinic staff, as long as protesters were not forced to move out of the way when approached by a protected person.²⁴⁵ On the other hand, a fifteen-foot floating buffer zone was held unconstitutional, as were all zones more than thirty-six feet—including a 300-foot “no-approach zone” and a 300-foot zone around private residences that included a prohibition against blocking street access.²⁴⁶

Order 3 exceeds all of the acceptable rules for regulating access to a specific location. Under these rules, the Seattle Police could have provided cordoned-off passageways for WTO delegates to make their way into the convention center. Following *Hill v. Colorado*,²⁴⁷ the police may also have forbidden that individuals approach within eight feet of another person “for the purpose of . . . engaging in oral protest . . . with [that] person.”²⁴⁸ Closing the entire downtown core to protesters for three days, however, restricted significantly more speech than necessary. Even if the City could show that such action was the only way to ensure access, there is no precedent for the closure of such a large area. Far from providing support for Order 3’s constitutionality,²⁴⁹ *Madsen, Schenk v. Pro-Choice Network*,²⁵⁰ and *Hill* show that Order 3 cannot survive First Amendment scrutiny.

In evaluating emergency powers as content-neutral restrictions on First Amendment rights, courts must apply *O’Brien*, *Ward*, *Bay Area Peace Navy*, and the abortion clinic entry-exit cases. If courts find that an emergency order is not narrowly tailored, or that it restricts more speech than necessary, the emergency order should be found unconstitutional. Order 3 is an example of an emergency order that fails both the rules in

243. See, e.g., *Hill v. Colorado*, 120 S. Ct. 2480, 2494 (2000) (noting that Colorado statute stated significant government interest).

244. See, e.g., *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 765 (1994).

245. *Id.* at 759; *Hill*, 120 S. Ct. at 2484, 2499.

246. See *supra* notes 134–40 and accompanying text.

247. 120 S. Ct. 2480 (2000).

248. *Hill*, 120 S. Ct. at 2484 (quoting COLO. REV. STAT. § 18-9-122 (3) (1999)).

249. See *supra* note 45 and accompanying text.

250. 519 U.S. 357 (1997).

O'Brien and *Ward* and the specific guidelines set out in the entry-exit cases.

E. Order 3 Is Unconstitutional as an Emergency Order

Order 3 represents the coalescence of two trends in emergency powers.²⁵¹ On the one hand, the use of executive action to restrict the large-scale exercise of First Amendment rights shows that the normal-emergency dichotomy has blurred. Without foreign aggression, a tsunami, or even a race riot, downtown Seattle was buttoned up and cordoned off. The “emergency” in Seattle was not an invasion or a natural disaster, but the coming together of large numbers of people to exercise First Amendment rights. On the other hand, the pressure on local officials to facilitate the ministerial meeting by curtailing peaceful protests shows that economic concerns are first-order priorities for modern governments. The preeminence of the WTO in the world economy positions Order 3 as a logical next step in exploiting the notion of “emergency” for the sake of political expediency. Indeed, mass demonstrations may create emergency situations for local governments. In responding to emergencies created by the large-scale exercise of First Amendment rights, however, local governments in the Ninth Circuit must follow *Collins v. Jordan*.²⁵²

Under *Collins*, daytime curfews are presumptively unconstitutional.²⁵³ As the *Collins* court held, a nighttime curfew and a daytime no-protest zone are “entirely different matter[s].”²⁵⁴ In noting that violence had occurred during evening protests, the *Collins* court refused to allow the extension of a protest ban to the daytime hours of the following day.²⁵⁵ Unless the City can show that such a ban was the only way to maintain public order and protect the rights of WTO delegates, Order 3 is unconstitutional under *Collins*.

Additionally, the *Collins* holding explicitly connects the duration of emergency orders with the requirement that First Amendment restrictions be narrowly tailored.²⁵⁶ An emergency on one day does not provide a

251. See *supra* Part III.A.

252. 110 F.3d 1363 (9th Cir. 1996).

253. See *id.* at 1371.

254. *Id.* at 1374.

255. *Id.*

256. *Id.* at 1372.

basis per se for banning protests on subsequent days; such a ban “is presumptively a First Amendment violation.”²⁵⁷ The City cannot show that an “emergency” existed in downtown Seattle during any daytime hours on December 1–3.²⁵⁸ *Collins* explicitly forbids the prophylactic use of no-protest zones, and under that decision Order 3 is unconstitutional.

The rule in *United States v. Chalk*²⁵⁹ suggests the opposite result. *Chalk* indicates that emergency orders will not be scrutinized where local officials act in good faith and have some factual basis for their actions.²⁶⁰ *Chalk* should not be applied here because that case and its progeny address riots and natural disasters, not mostly peaceful political protests.²⁶¹ Also, the *Chalk* line of cases does not address daytime no-protest zones or other daytime bans on expressive activity.²⁶² *Collins*, aside from being the controlling authority in the Ninth Circuit, provides a better rule because it specifically addresses daytime curfews and political protest.

In refusing to grant the ACLU’s motion for a TRO against the enforcement of Order 3, Judge Bryan effectively gave the City of Seattle the right to institute its own injunction against nonviolent protesters. Judge Bryan’s hesitancy to second-guess the government’s interest in establishing order during the ministerial meeting is understandable. However, by denying the ACLU’s motion, the court violated the holding of *Collins* and sanctioned the comprehensive denial of protesters’ First Amendment rights.

V. CONCLUSION

Mass protests have reemerged in the era of globalization, highlighting a dialectic of integration and alienation among environmentalists, human rights advocates, and labor interests. The media attention and public awareness attendant to these protests is a strong incentive toward their use in furthering political goals. Without First Amendment protection, these dissenting voices will be quieted. In a media environment

257. *Id.* at 1371.

258. *See supra* notes 35–39 and accompanying text.

259. 441 F.2d 1277 (1971).

260. *Id.* at 1281.

261. *See id.*

262. *See id.*

dominated by sound bites and scandals, activists without the tool of mass protest may go unnoticed and unrecognized.

Emergency Order 3, issued by Mayor Schell in the morning of December 1, 1999, violated the First Amendment to the U.S. Constitution. Instead of promulgating narrowly tailored emergency orders to protect WTO delegates and to prevent violence, Mayor Schell forced an end to peaceful protest demonstrations. Order 3 made peaceful protesters guilty by association, punishing them for the sporadic violence of the Black Block and other fringe groups. In addition, Order 3 restricted too much speech—it closed the public forum of downtown Seattle for three days, longer than was necessary to restore order and protect the WTO delegates.

The Seattle WTO protests indicate that a more developed and aggressive jurisprudence addressing these issues is necessary and timely. At the very least, courts should protect the rights of peaceful protesters by striking down government action that goes too far in trampling First Amendment rights. Litigation regarding Order 3 should reflect the need for consistent, meaningful protection of the freedom of speech. There must be a constitutional lesson learned from the “Battle in Seattle”: When authorities respond to mass protests, they must be diligent, deliberate, and careful not to restrict too much speech. What was not demonstrated in Seattle—but what this Comment attempts to show—is that police must coexist with protestors, public order must tolerate dissent, and emergency does not justify censorship.